

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
AMERICAN TRANSPORT, INCORPORATED  
and MOBIL OIL CORPORATION,

Appellants,

v.

PUGET SOUND AIR POLLUTION  
CONTROL AGENCY,

Respondent.

PCHB Nos. 84-266 and 84-269

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER

THESE MATTERS, the appeal of a notice and order of civil penalty and associated \$1,000 penalty for violation of respondent agency's Regulation II, Section 2.07(b)(3) for allowing the transfer of gasoline from a transport tank to a storage tank without having a vapor recovery system in operation, came on for hearing before the Board; Wick Dufford and Gayle Rothrock (presiding officer) on April 24, 1985, at Seattle. Lawrence J. Faulk, Board member, reviewed the transcript and record in these matters. Respondent elected a formal hearing pursuant to RCW 43.21B.230 and WAC 371-08-155.

1 Appellant American Transport, Inc., was represented by its  
2 president, John H. Moss. Appellant Mobil Oil Corporation was  
3 represented by attorney-at-law Stanley Roller. Respondent Agency was  
4 represented by its attorney, Keith D. McGoffin. Laura D. Rawlins,  
5 court reporter, officially reported and transcribed the proceedings.

6 Witnesses were sworn and testified. Exhibits were admitted and  
7 examined. Oral argument was heard. From the testimony, evidence, and  
8 contentions of the parties, the Board makes these

9 FINDINGS OF FACT

10 I

11 Respondent has filed a copy of its Regulations I and II, and all  
12 amendments thereto, with the Board, which is noticed.

13 II

14 On the afternoon of August 8, 1984, at approximately 5:00 p.m., an  
15 inspector for respondent was westbound on Northgate Way and observed a  
16 gasoline transport truck and trailer at a gasoline station at 11001  
17 Roosevelt Way NE. The truck was labeled as an American Transport,  
18 Inc., vehicle. The skies were clear and the temperature was  
19 approximately 80 degrees.

20 The truck's trailer tank hose was transferring product to an  
21 underground storage tank. No vapor return line was connected to the  
22 underground storage tank or to the truck's trailer during the delivery  
23 of the product, at 5:15 p.m. The inspector was able to detect  
24 gasoline vapor odor in the delivery area.

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III

Respondent's inspector questioned the truck driver, Don Phipps, as to why he was not using a vapor return line while dropping product. Mr. Phipps stated that he did not have a vapor return line long enough to reach from the underground storage tank to the truck. Mr. Phipps later wrote a note indicating that the proper equipment of adequate length was, in fact, available on the truck. It was his decision simply not to use the equipment during this delivery.

The Station Manager, Darrel Brown, approached the truck driver and inspector and when the delivery was complete, an inspection of the underground storage tank was made. The inspection revealed that all the equipment needed at that tank for receiving fuel and for vapor return was on hand.

Thus, the available system from both the transport truck and the storage tank was capable of being fully operational. Ten thousand six hundred gallons of regular gasoline (product) had been dropped into the underground storage tank without the use of the vapor recovery system.

Mr. Phipps and Mr. Brown were informed that a violation of PSAPCA Regulation II, Section 2.07(b)(3) had occurred and a Notice of Violation would be issued.

IV

As a lessee/operator under terms of a contract with Mobil Oil Corporation, Darrel Brown operates a station with Mobil colors, logo, signage and even Mobil insignia on work uniforms. Mobil gasoline fuel

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1 is exclusively sold at the subject station (No. 19-073).

2 Mobil owns the land and the improvements thereon, including the  
3 underground storage tank and certain vapor recovery equipment  
4 associated with the tank.

5 The lessee/operator's responsibilities for maintenance and upkeep  
6 are set forth in the detailed lease document. Among these, in Mobil's  
7 view, are the maintenance and replacement of the vapor recovery nozzle.

8 However, whatever the distribution of responsibilities may be as  
9 between Mobil and its operators, it does not appear from this record  
10 that any of the equipment required for vapor recovery at the receiving  
11 end was missing, improperly maintained or not in working order at the  
12 time in question.

13 V

14 In most cases gasoline ordered for stations using Mobil products  
15 (either leased or company operated) is delivered directly by Mobil's  
16 own fleet of trucks. Deliveries are scheduled through a national  
17 dispatch center in Valley Forge, Pennsylvania, on a 24-hour-a-day  
18 basis. When all available Mobil trucks are scheduled, the center  
19 assigns deliveries to common carriers. American Transport is a common  
20 carrier which, over time, has made numerous deliveries for Mobil. It  
21 is fully equipped for and cognizant of relevant vapor recovery  
22 requirements.

23 Deliveries may occur at any hour of the day or night. For this  
24 reason, by industry practice, a lock box is provided at the stations  
25 from which transport drivers may obtain keys to get access to storage

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1 tanks and attendant equipment when the station is not open.

2 VI

3 Mr. Phipps was a driver in the employ of American Transport, Inc.  
4 He was obliged to operate under that company's terms of employment.  
5 In commencing his employment, Mr. Phipps made written agreement to  
6 abide by certain safety rules or face termination. Among these rules  
7 was collecting vapors as required by law. Mr. Phipps was terminated  
8 after the company learned of the incident.

9 VI

10 There is no evidence that Mobil had any authority over the actions  
11 of Mr. Phipps. Mobil neither hired him nor had the power to fire him.

12 VII

13 Appellant companies learned of the incident and intent to issue a  
14 notice of violation from telephone calls made by respondent's  
15 inspector on August 9, 1984. The company representatives expressed  
16 their surprise at such an incident and their confidence the proper  
17 equipment was there to be used.

18 Notice of Violation No. 20360 was issued jointly to Mobil Oil and  
19 American Transport on August 9, 1984, by respondent PSAPCA.

20 VIII

21 Notice and Order of Civil Penalty No. 6191 for \$1,000 was issued  
22 by PSAPCA on September 27, 1984, to both companies. From this  
23 appellants appealed to the Board on October 8, 1984.

24 IX

25 The events here represent the first time that either Mobil or

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1 American Transport is aware of a vapor recovery hook-up lapse in the  
2 delivery of Mobil fuel within PSAPCA's jurisdiction.

3 The requirement for vapor recovery is imposed in order to help  
4 control ozone problems. Vapor which escapes at the site of this  
5 service station contributes to an existing condition of non-compliance  
6 with national ambient air standards for ozone.

7 X

8 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
9 adopted as such.

10 From these Findings of Fact the Board comes to these

11 CONCLUSIONS OF LAW

12 I

13 The Board has jurisdiction over these persons and these matters.  
14 Chapters 43.21B and 70.94 RCW.

15 II

16 PSAPCA's Regulation II, Section 2.07(b)(3) provides:

17 2.07 Gasoline Stations.

18 (b) It shall be unlawful for any person to cause or  
19 allow the transfer of gasoline from any transport  
20 tank into any stationary storage tank...unless the  
following conditions are met:

21 (3) All vapor return lines are connected between  
22 the transport tank and the storage tank and the  
vapor recovery system is operating.

23 III

24 In light of the prevailing industry practice involving deliveries  
25 during hours when stations are closed, we interpret Section 2.07(b)(3)  
26 to place responsibility for connecting vapor lines on the deliverer,

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1 not the station operator. We do not believe PSAPCA contemplated  
2 either requiring station operators to be present after hours or  
3 requiring all deliveries to be made during the working day.

4 Therefore, the relative duties of Mobil and its lessee/operator in  
5 relation to station equipment are irrelevant here. If a  
6 station-related part of the vapor recovery system had been  
7 non-operational or missing, we would have a different case.

#### 8 IV

9 On August 8, 1984, Section 2.07(b)(3) was violated when Mr. Phipps  
10 failed to connect and operate the vapor recovery system. The question  
11 presented is whether either or both the entities jointly assessed the  
12 penalty herein should be relieved of liability.

13 The appropriate analogies for analyzing the vicarious liability  
14 issues are from tort law.

#### 15 V

16 We conclude that American Transport is liable for a penalty here  
17 under conventional principles of respondeat superior. The Washington  
18 Clean Air Act is a strict liability statute and, thus, argument about  
19 the company's intentions or procedures goes to the amount of penalty,  
20 not to the question of substantive liability.

#### 21 VII

22 The liability of Mobil presents a more difficult question. Mr.  
23 Phipps was not Mobil's employee. American Transport occupies the  
24 position of an independent contractor with Mobil. However, the  
25 traditional insulation of an employer from liability for harm to third

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1 persons by an independent contractor does not automatically follow.  
2 See Jackson v. Standard Oil of California, 8 Wn. App. 83, 505 P.2d 139  
3 (1972).

#### 4 VIII

5 Mobil, by manufacturing and marketing gasoline products, has set  
6 in motion forces which pose recognized dangers. Among these is the  
7 danger that vapor will escape during gasoline transfer unless proper  
8 equipment is in place and proper procedures are followed.

9 The escape of vapors in certain localities, such as here,  
10 exacerbates a non-attainment problem for legislatively mandated ozone  
11 standards. The exceedance of these standards is injurious to public  
12 health and welfare. PSAPCA Regulation II, Section 2.07(b)(3) is a  
13 rule imposing an absolute duty to provide safeguards for the safety of  
14 others.

15 Under the circumstances of this case, however, we conclude that  
16 Section 2.07(b)(3) does not place this duty on Mobil, and we decline  
17 to apply the non-delegable duty approach of Section 424, Restatement  
18 [Second] of Torts (1965). That Section states:

19 One who by statute or by administrative regulation is  
20 under a duty to provide specified safeguards or  
21 precautions for the safety of others is subject to  
22 liability to the others for whose protection the duty  
is imposed for harm caused by the failure of a  
contractor employed by him to provide such safeguards  
or precautions.

23 Here the harm does not consist in the identified injury of any  
24 person. The problem is, rather, a civil wrong against the public at  
25 large. The policy purpose of spreading the risk of loss to reach an

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1 entity in Mobil's position is not present when liability has no  
2 compensatory effect but rather results only in the exaction of a  
3 penalty designed to influence behavior. It is difficult to see, here,  
4 how penalizing Mobil would make repetition of an occurrence like the  
5 one in this case less likely.

6 Accordingly, we reverse the imposition of the penalty in question  
7 on Mobil.

8 IX

9 While recognizing that we are dealing with a non-attainment  
10 problem, we nonetheless believe the penalty is excessive in light of  
11 its being the first of its kind for American Transport and of the  
12 Company's policies and procedures designed to prevent such  
13 occurrences. Therefore, a portion of the amount assessed should be  
14 vacated.

15 X

16 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
17 adopted as such.

18 From these Conclusions the Board enters this  
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ORDER

Notice and Order of Civil Penalty No. 6141 issued by PSAPCA is affirmed in the amount of \$500; \$500 of the penalty is vacated.

DONE this 12<sup>th</sup> day of June, 1985.

POLLUTION CONTROL HEARINGS BOARD

  
GAYLE ROTHROCK, Vice Chairman

  
WICK DUFFORD, Lawyer Member

 6/11/85  
LAWRENCE J. FAULK, Chairman

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